Case No. _____

IN THE UNITED STATES SUPREME COURT
October Term 1997

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A WARRANT IS REQUIRED BY THE FOURTH AMENDMENT TO SEIZE A MOTOR VEHICLE UNDER A CONTRABAND FORFEITURE ACT AND FOR SUBSEQUENT SEARCH OF SAID VEHICLE CONFLICTS WITH DECISIONS OF THE COURT IN CARROLL V. UNITED STATES, CALERO-TOLEDO V. PEARSON YACHT LEASING, AND COOPER V. CALIFORNIA, THAT OF THE ELEVENTH CIRCUIT IN UNITED STATES V. VALDES AND THE MAJORITY OF STATE COURTS ADDRESSING THIS ISSUE?

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CASE NO. _____

IN THE UNITED STATES SUPREME COURT
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OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported as White v. State, 710 So.2d 949 (Fla. 1998).

Petitioner's Appendix contains the opinion of the Florida Supreme Court below, Case No. 88,813, (A 1-22), as well as the court's order denying rehearing. (A 23). The appendix further contains the opinion of the Florida First District Court of Appeal, White v. State, 680 So.2d 550 (Fla. 1st DCA 1996). (A 24-45). The parties will be referred to as they appear before this Court or as they stood in the court(s) below[1].

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[1]The symbol "A" followed by the appropriate page number expresses a citation to the materials contained in the Appendix to this pleading.

JURISDICTION

The decision below was entered on February 26, 1998. Petitioner's Motion for Rehearing was denied June 1, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the following amendments to the United States Constitution are involved:

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is applicable to the states through the Fourteenth Amendment of the United States Constitution which provides in pertinent part:

> Section 1. No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, § 12 of the Florida Constitution provides in pertinent part:

> Searches and seizures. - This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

The material facts, as set out by the Florida Supreme Court in the body of its decision are as follows:

> On October 14, 1993, petitioner Tyvessel Tyvorous White (White) was arrested at his place of employment on charges unrelated to this case. After taking White into custody on those unrelated charges, and securing the keys to his automobile, the arresting officers seized his automobile from the parking lot of White's employment. The police did not seize the vehicle incident to White's arrest or obtain a prior court order or warrant to authorize the seizure. Rather, the basis of the seizure was the arresting officers' belief that White's automobile had been use several months earlier to deliver illegal drugs, and therefore the vehicle was subject to forfeiture by the government. After confiscation of the vehicle, a subsequent search turned up two pieces of crack cocaine in the ashtray.
>
> Based on the discovery of the cocaine, White was charged with possession of a controlled substance. White subsequently objected to the introduction into evidence of the cocaine seized during the post-arrest search of his automobile. The trial court reserved ruling on the issue and allowed the evidence to go to a jury. White was thereafter convicted of possession of cocaine, and subsequently the trial court formally denied

White's objection and motion to suppress the cocaine evidence.

On appeal, the First District affirmed White's conviction and approved the government's warrantless seizure of White's car. The majority opinion found that the government met the requirements of the Florida Contraband Forfeiture Act, sections 932.701-932.707, Florida Statutes (1993)(hereinafter Forfeiture Act) in that the warrantless seizure of White's automobile was based upon probable cause to believe that the vehicle had facilitated illegal drug activity at some time in the past. Further, the majority found that the warrantless seizure did not violate White's Fourth Amendment right to be secure against unreasonable searches and seizures.

(A 2-3, footnotes deleted)

The Florida Supreme Court held that on these facts, the District Court's opinion was in error and adopted the out-of-circuit decision in United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992). This minority view, which is contrary to the controlling authority of the Eleventh Circuit, provides that a warrant was required under the Fourth Amendment for seizure and search of Respondent's vehicle.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE FLORIDA SUPREME COURT IS IN DIRECT CONFLICT WITH DECISIONS OF THE COURT THAT NO WARRANT IS REQUIRED UNDER THE FOURTH AMENDMENT TO SEIZE, SEARCH AND FORFEIT A MOTOR VEHICLE PURSUANT TO A CIVIL FORFEITURE ACT, AND DIRECTLY CONFLICTS AS WELL WITH DECISIONS OF THE ELEVENTH CIRCUIT AND THE MAJORITY OF STATE COURTS ON THIS POINT. THEREFORE, THIS COURT SHOULD ACCEPT JURISDICTION TO RESOLVE THE CONFLICT BETWEEN THE DECISION OF THE FLORIDA SUPREME COURT AND THOSE OF THE COURT THE ELEVENTH CIRCUIT, AND THE MAJORITY OF STATE COURTS.

The decision of the Florida Supreme Court holding that a warrant is required by the Fourth Amendment for seizure of an automobile under a contraband forfeiture statute is contrary to controlling precedent of the Court and that of the Eleventh Circuit, the controlling federal circuit for Florida[2], as well as the majority of state courts addressing this issue.

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[2]Under the Florida Constitution there cannot be an independent and adequate state ground to support the decision of the Florida Supreme Court. Under Art. I, § 12 of the Florida Constitution, Fourth Amendment issues in the Florida courts must be decided in conformity with decisions of this court, and the Florida courts can afford no higher level of Fourth Amendment protection. Bernie v. State, 524 So.2d 988, 990-991 (Fla. 1988). The Florida Supreme Court explicitly recognized this constraint in its decision below: "In 1982, article I, section 12 of the Florida Constitution was amended to add what has become known as the conformity clause because 'we are bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment and provide no greater protection than those interpretations.'" (A 3, n.3). Therefore, this Court's decisions interpreting the Fourth Amendment are conclusive on the issue presented; definitionally there is no independent and adequate state ground to support the decision below. See Ohio v. Robinette, 519 U.S. 33, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996).

In reaching this contrary decision, the state court ignored well settled doctrine of the Court expressed in cases such as Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), Calero-Toledo v. Pearson Yacht Leasing, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), and Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967). The state court rejected as well the majority view of the Federal Circuits on this issue, expressed in the Eleventh Circuit's decision in United States v. Valdes[3], 876 F.2d 1554 (11th Cir. 1989), and opted instead for the minority view, as set out in the Second Circuit's decision in United States v. Lasanta[4], 978 F.2d 1300 (2d Cir. 1992).

As a result, there now exists in Florida the inherently anomalous situation that an automobile seized by state officers cannot be searched and forfeited without warrant as the Fourth Amendment is interpreted by the Florida Supreme Court, while that same automobile, seized for identical reasons by federal officers, can be searched and forfeited without warrant under

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[3]The majority view of the federal circuits, as set out in Valdes is that no antecedent warrant is required for seizure, search, and forfeiture of an automobile under a civil forfeiture act. United States v. Pace, 898 F.2d 1218 (7th Cir.), *cert. Denied*, 497 U.S. 1030, 110 S.Ct. 3286, 111 L.Ed.2d 795 (1990); United States v. One 1978 Mercedes Benz, 711 F.2d 1297 (5th Cir. 1983); United States v. Kemp, 690 F.2d 397 (4th Cir. 1982); United States v. Bush, 647 F.2d 357 (3d Cir. 1981). The minority view, as expressed in United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992) is that a warrant is required before seizure, search and forfeiture. The Tenth Circuit has adopted Lasanta in United States v. Dixon, 1 F.3d 1080 (10th Cir. 1995), holding that either a warrant or a recognized exception thereto is required for a valid seizure. An intermediate approach is adopted by other circuits, limiting the validity of warrantless seizure under a forfeiture statute to situations where exigent circumstances exist, In re Warrant to Seize One 1988 Chevrolet Monte Carlo, 861 F.2d 307 (1st Cir. 1988), or where there is a recognized exception to the warrant requirement, United States v. Linn, 880 F.2d 209 (9th Cir. 1989).

[4]In Lasanta, the Second Circuit expressly acknowledged its construction of federal civil forfeiture statute 21 U.S.C. § 881(b)(4) directly conflicted with that of Valdes. 978 F.2d 1304.

the Fourth Amendment, as interpreted by the Eleventh Circuit. Such a result cannot be permitted to stand.

As is apparent, the result of the Florida Supreme Court's decision is that there are now two different Fourth Amendment standards applying to seizures, searches, and forfeitures in Florida. The Florida Supreme Court's holding is contrary to this Court's decisions as well as contrary to the Eleventh Circuit's decision on this subject matter.

The decisions of this Court on seizure questions arising under the Fourth Amendment make clear that no antecedent warrant is required for law enforcement to validly seize a motor vehicle or other readily moveable instrumentality. That has been settled law from this court for three quarters of a century. Carroll v. U.S., 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

In Carroll, the court upheld warrantless stop of a vehicle, search of the interior, confiscation of contraband liquor found therein and potential forfeiture of the automobile under a federal prohibition forfeiture act[5]. The facts of Carroll show that on September 29th, 1921 federal agents attempted to set up a liquor buy of three cases of whiskey in a Grand Rapids, Michigan, apartment. The sellers, Kurska, Carroll and Kiro never brought the liquor. The officers noted they were driving an Oldsmobile. On October 6th, the officers saw Carroll and Kiro in the same car on the Grand Rapids-Detroit road, and followed them, but eventually lost them. On December 15, 1921, the officers spotted Carroll and Kiro in the same car heading into Grand Rapids from the direction of Detroit. The federal officers and a state trooper turned around and stopped the car about 16 miles east of Grand Rapids. A search of the car uncovered bottles of liquor hidden behind the seat upholstery. 267 U.S. at 134-136. "The officers were not anticipating that the defendants would be coming through on the highway at that particular time, but when they met them there

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[5]The Court has affirmed that forfeitures are in rem civil proceedings, not in personam criminal proceedings, and do not impose punishment. United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996).

they believed they were carrying liquor, and hence the search, seizure, and arrest." Id. at 136.

On these facts, the Court found probable cause to stop, conduct the search, no basis for suppression of the liquor, but eligibility of the vehicle for seizure under a Prohibition forfeiture act. This Court stated in Carroll, "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for the belief that the contents of the automobile offend against the law." 267 U.S. at 158-159. After extensive review of the long standing doctrine that no warrant is needed for stop and search of vessels, wagons, and other readily mobile instrumentalities, the court stated that by

> what is shown by this record, it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.

267 U.S. 162

To pose the question addressed in Carroll to the instant matter: What reasonable cause did the seizing officer here have for the belief that the contents of Respondent's automobile offend against the law? This record demonstrates that the facts here are just as strong as, if not more so, than those found by the Court in Carroll to be clearly sufficient to establish basis for a lawful stop, search and seizure.

Respondent here was seen by police eyewitnesses, and was videotaped utilizing his automobile to deliver and sell cocaine. White v. State, 680 So.2d 550, 551 (Fla. 1st DCA 1996), (A 25). These events occurred on July 26, August 4 and August 7, 1993. (A 2, n.2). Appellant was arrested on unrelated charges on October 14, 1993, and his car seized by the officers on

belief that it had been used in the above noted drug transactions. (A 2).

In Carroll, the Court found reasonable cause to believe the car was being utilized to transport contraband liquor when it was seen on a public highway some two and a half months after one failed liquor transaction. Here, the car was seized some two and a half months after three successfully completed narcotics transactions.

Once a valid seizure has been established, supra, it naturally, logically, and legally flows as a result of that seizure that the vehicle can be searched, incriminating evidence uncovered as a result of that search introduced against petitioner at trial, and the vehicle can be forfeited. Indeed, this is precisely what the Court has held in cases pursuant to the long established doctrine set down in Carroll.

For example, in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), the Court permitted seizure and forfeiture under a Puerto Rican drug statute of a pleasure yacht without prior warrant or prior adversary hearing, even though the yacht owner, the leasing company, was completely unaware of illegal activity on the vessel. The seizure of the vessel took place two months after the offense, and the boat was forfeited to the Puerto Rican government.

The Court in Calero-Toledo noted that preseizure notice of forfeiture could well frustrate the interests served by the statute because a readily moveable instrumentality such as a yacht --or in this case, an automobile -- could be moved out of the jurisdiction, damaged, destroyed, or concealed if advance warning were given. The Court further noted that forfeiture statues serve an important governmental interest by removing from circulation the conveyance, which can be used to facilitate illegal activity time and time again, and, by forfeiture of the conveyance, rendering the illegal activity as a whole unprofitable.

In Cooper v. California, 386 U.S. 58, 87 S. Ct. 788, 17 L.Ed.2d 730 (1967), the Court upheld against Fourth Amendment challenge the seizure, subsequent search, and

introduction of narcotics into evidence. Appellant in Cooper was arrested for narcotics charges, and his car seized without warrant and impounded for evidence and subsequent forfeiture under California law[6]. As here, the basis of the seizure was evidence which showed the car had been used to carry on narcotics possession and transportation. The car was searched a week after seizure without warrant at the impound yard, and the Court held that evidence discovered during that search was validly introduced during trial. The car was forfeited to the state four months after the seizure. The Court stated, 386 U.S. 58, 62:

> It is no answer to say that the police could have obtained a search warrant, for the relevant test is not whether it is reasonable to obtain a warrant, but whether the search was reasonable. Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding.

(internal bracketing, quotations and citation deleted)

Of recent note, the Court in Bennis v. Michigan, 516 U.S. 442, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996) held there was no constitutionally required "innocent owner" defense to forfeiture, and such did not offend the compensation component of the Fifth Amendment made applicable to the states through the due process clause of the Fourteenth Amendment. This holding is in direct conflict with the rationale of the Florida Supreme Court in the instant case that, "We simply cannot accept the government's position that it may act at anytime,

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[6]The statute, Section 11611 of the California Health and Safety Code specified that when making a narcotics arrest, the arresting officer was to seize "any vehicle used to store, conceal, transport, sell or facilitate the possession of narcotics[.]" 386 U.S. 58, 60. The car was to be held as evidence by the state until a forfeiture or release was ordered. Id. Section 11610 of the California code specified that the owner of any automobile used for such purposes forfeited his ownership interest in the vehicle to the state. Id. at n.1.

anywhere, and regardless of the existence of exigent circumstances, or a change in ownership or possession, to seize a citizen's property once believed to have been used in illegal activity, without securing authorization of a neutral magistrate." (A 8)[7].

Besides being contrary to controlling decisions of this Court, the Florida Supreme Court decision is in opposition to settled law of the Eleventh Circuit. In United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989) the Eleventh Circuit rejected the proposition adopted by the Florida Supreme Court here, namely that the Fourth Amendment requires a pre-seizure warrant to validly effect a seizure under a forfeiture statute. In so doing, the Eleventh Circuit found that 21 U.S.C. § 881(b)(4) plainly and unambiguously authorized the government to seize an offending vehicle where there was probable cause to believe it forfeitable. 876 F.2d at 1557. The Eleventh Circuit upheld the seizure and subsequent search even though there were no exigent circumstances. Id. The Court stated, 876 F.2d at 1558:

> Appellants contend that the seizures in this case were unreasonable, and thus violated the amendment, because they were made without a warrant, and no exigent circumstances which made the acquisition of a warrant impracticable existed. Hence, the district court should have invoked the exclusionary rule and suppressed the challenged evidence. *See, e.g., Torres v. Puerto Rico*, 442 U.S. 465, 471, 99 S.Ct. 2425, 2430, 61 L.Ed.2d 1 (1979).
>
> The agents seized Valdes' Cadillac on the street, in front of Lopez' house; they seized Lopez' Oldsmobile Toronado in his garage. Neither appellant contends that the agents

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[7]There simply was no change of ownership or possession of this automobile. Bennis. Police could validly seize the vehicle later, at a different location, without obtaining any intervening warrant, and subject the vehicle to forfeiture. Carroll.

> seized his automobile from a place where he had a legitimate expectation of privacy; in other words, we assume the agents had a right to be where they were when they took the cars.
>
> We are aware of no Supreme Court precedent that would require us to hold that, on these facts. the agents needed a warrant to seize appellants' automobiles.

In so holding, the Eleventh Circuit analogized to this court's decision in United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), upholding warrantless arrest of a person by postal inspectors on statutory authority. The Eleventh Circuit concluded by relying on this Court's decision in Calero-Toledo, supra for the proposition that, "If federal law enforcement agents, armed with probable cause, can arrest a drug trafficker without repairing to the magistrate for a warrant, we see no reason why they should not also be permitted to seize the vehicle the trafficker has been using to transport his drugs[,]" and found the seizure reasonable under the Fourth Amendment. 876 F.2d at 1559-1560.

It is readily apparent from an examination of the federal forfeiture statute, 21 U.S.C. § 881, interpreted in Valdes to require no pre-seizure warrant under the Fourth Amendment and the operative state statute here, the Florida Contraband Forfeiture Act, sections 932.701-932.707, Florida Statutes (1993), interpreted by the Florida Supreme Court to require a warrant under the Fourth Amendment, that the two enactments are analytically indistinguishable on the issue presented. Both provide for warrantless seizure of a vehicle on probable cause[8]

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[8]Section 932.703(2)(a), Florida Statutes (1993) provides: "Personal property may be seized at the time of the violation or subsequent to the violation..."The statute clearly intends for there to be viable pre-hearing seizures, for it provides for "a postseizure adversarial preliminary hearing" upon request. Section 932.703(2)(a), Florida Statutes (1993). At the adversarial preliminary hearing, "the seizing agency is required to establish probable cause that the property is subject to forfeiture[.]" Section

that the car was used "to transport, or * * * to facilitate the transportation, sale, receipt, possession, or concealment of" controlled substances, 21 U.S.C. § 881 (b)(4), or, as phrased by the state statute, "to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article." Section 932.702(3), Florida Statutes (1993).

Section 932.701(2)(a)1, Florida Statutes (1993) defines contraband as including any substance controlled under Chapter 893, Florida Statutes[9], and any substance, device, paraphernalia, currency, or other means of exchange used or attempted to be used in violation of the provisions of chapter 893.

The Florida Supreme Court decision is also contrary to the majority of state court decision which have addressed this issue under federal, as opposed to state constitutional grounds. In Blackmon v. Brotherhood Protective Order of Elks, Toccoa Lodge No. 1820, 232 Ga. 671, 208 S.E.2d 483 (Ga. 1974), the Georgia Supreme Court permitted warrantless seizure and subsequent forfeiture of liquor kept at a social club in a "dry" county. Relying on Calero-Toledo v. Pearson Yacht, the Georgia court found that opportunity for post-seizure hearing to contest the validity of the seizure was "sufficient process of law under the Federal Constitution[.]" 208 S.E.2d at 485. In State v. Brickhouse, 20 Kan. App. 2d 495, 890 P.2d 353 (Kan. App. 1995), the Kansas court upheld warrantless seizure, search and forfeiture of an automobile under a state forfeiture act because police officers had probable cause to believe the car was being used to violate state drug laws. Relying on Cooper and Valdes, and rejecting Lasanta, the Kansas court stated it found the majority view persuasive and held warrantless seizure and subsequent search of a motor vehicle under a state forfeiture act based on probable cause the car was being used

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932.701(2)(f), Florida Statutes (1993).

[9]Titled "Drug Abuse Prevention and Control" Chapter 893 prohibits, among other things, delivery or distribution of cocaine. Chapter 893.03(2)(a)4.

to violate state drug laws did not violate the Fourth Amendment. It further held that evidence uncovered during the search could be validly introduced into evidence at a criminal trial. In Frail v. $24,900 in United States Currency, 192 W.Va. 473, 453 S.E.2d 307 (W. Va. 1994), the West Virginia Supreme Court permitted warrantless seizure of property upon probable cause under that state's forfeiture act, finding §881(b)(4) persuasive on the issue, but reversing the judgment because it found there was insufficient probable cause in the case to justify the original seizure. In State v. Gwinner, 59 Wash. App. 119, 796 P.2d 728 (Wash. App. 1990), *review denied*, 117 Wash. 2d 1004, 814 P.2d 266 (1991), a state officer provided a tip to federal officers which ultimately led the DEA agents to seize and search a truck at an airport parking garage without warrant pursuant to § 881(b)(4). The cocaine uncovered in the truck was introduced against appellant at his state trial. The state court rejected Fourth Amendment challenge to the warrantless search and seizure, finding the federal officers had probable cause, all that is required under § 881(b)(4). The state court recognized that although the warrantless seizure and search was valid under the Fourth Amendment, it might well have been invalid if analyzed under state constitutional provisions. However, the court said that the reasonableness of a search by federal officers is to be judged under federal, not state search and seizure doctrine[10].

Seemingly, only two state courts have reached a result in alignment with that of the Florida Supreme Court in this case. In Davis v. State[11], 813 P.2d 1178 (Utah 1991), the Utah Supreme Court read its state forfeiture statute (similar to § 881(b)(4)) as requiring either a warrant or exigent circumstances for seizure under that state statute. The court stated it was reached this result because the Utah statute was "significantly different" than the federal law because it was not based on Admiralty principles. 813 P.2d 1178, 1182-1183.

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[10]This point is significant in that under the Florida Constitution, see n. 2, supra, there is no state standard. Search and seizure questions can only be resolved by reference to Fourth Amendment decisions of the Court.

[11]The other is Application of Harnischfeger, 158 Misc.2d 299, 600 NYS 2d 894 (Sup. 1993) in which the court observed in dicta that the constitutionality of warrantless seizure authorized by a state forfeiture statute was in doubt in light of the then recently issued Lasanta decision of the Second Circuit. 600 NYS 2d 894, 896-897. Harnischfeger was issued by a trial level New York court, and a Shepherd's check turns up no subsequent citations to it.

This Court has upheld seizure without warrant or prior notice and subsequent forfeiture of the conveyance under forfeiture statutes for over 75 years. Such is the case when the seizure of the offending conveyance occurs two and a half months later and up to 16 miles away from the site of the offense. Carroll. Such seizure is permissible with no prior notice. Calero-Toledo. Such forfeiture is permissible even if the owner of the conveyance be wholly innocent. Calero-Toledo, Bennis. Search of a conveyance held subject to forfeiture requires no warrant. Cooper.

Necessity for obtaining an antecedent warrant under the Fourth Amendment for seizure and forfeiture of a conveyance has been rejected by this Court in the context of both federal, Carroll, and state or territorial forfeiture statutes, Calero-Toledo, as well as for search post-seizure of such a conveyance, Cooper. Necessity of an antecedent warrant under the Fourth Amendment for seizure under an analytically indistinguishable federal civil forfeiture statute has been rejected by the Eleventh Circuit. Valdes.

It is thus seen that the Florida Supreme Court clearly erred in its interpretation of well settled law established by the decisions of this Court and of the Eleventh Circuit in holding that the Fourth Amendment requires issuance of a warrant for seizure, pursuant to the Florida Contraband Forfeiture Act, of a conveyance reasonably believed to have been utilized for the transportation and to facilitate the sale of cocaine.

CONCLUSION

The decision of the Florida Supreme Court below is in conflict with well established Fourth Amendment law as set down in decisions of this Court as well as a decision of the Eleventh Circuit. Because of this conflict, Respondent respectfully requests this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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SUPREME COURT OF FLORIDA

TYVESSEL TYVORUS WHITE,

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vs.

STATE OF FLORIDA,

Respondent.

No. 88,813

[February 26, 1998]

ANSTEAD, J.

We have for review the opinion in White v. State, 680 So. 2d 550 (Fla. 1st DCA 1996). We accepted jurisdiction to answer the following question certified to be of great public importance:

> WHETHER THE WARRANTLESS SEIZURE OF A MOTOR VEHICLE UNDER THE FLORIDA FORFEITURE ACT (ABSENT OTHER EXIGENT CIRCUMSTANCES) VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION SO AS TO RENDER EVIDENCE SEIZED IN A SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE

INADMISSIBLE IN A CRIMINAL PROSECUTION.

Id. at 555. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. For the reasons expressed below, we answer the certified question in the affirmative. We hold that a citizen's property is protected by the federal and Florida constitutions against warrantless seizure even when the seizure is done pursuant to a statutory scheme for forfeiture.

MATERIAL FACTS[1]

On October 14, 1993, petitioner Tyvessel Tyvorus White (White) was arrested at his place of employment on charges unrelated to this case. After taking White into custody on those unrelated charges, and securing the keys to his automobile, the arresting officers seized his automobile from the parking lot of White's employment. The police did not seize the vehicle incident to White's arrest or obtain a prior court order or warrant to authorize the seizure. Rather, the basis of the seizure was the arresting officers' belief that White's automobile had been used several months earlier to deliver illegal drugs, and therefore the vehicle was subject to forfeiture by the government.[2] After confiscation of the vehicle, a subsequent search turned up two pieces of crack cocaine in the ashtray.

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[1]The following facts are taken from the First District's opinion. White, 680 So. 2d at 551-55.

[2]The dates of the alleged prior illegal activities were July 26, 1993, and August 4 and 7, 1993. We commend the State's candor in providing these dates during oral argument. As both parties noted at oral argument, the record is unclear as to the actual dates. The State noted that these dates are contained in White's motion for postconviction relief under Florida Rule of Criminal Procedure 3.850.

Based on the discovery of the cocaine, White was charged with possession of a controlled substance. White subsequently objected to the introduction into evidence of the cocaine seized during the post-arrest search of his automobile. The trial court reserved ruling on the issue and allowed the evidence to go to a jury. White was thereafter convicted of possession of cocaine; and subsequently the trial court formally denied White's objection and motion to suppress the cocaine evidence.

On appeal, the First District affirmed White's conviction and approved the government's warrantless seizure of White's car. The majority opinion found that the government met the requirements of the Florida Contraband Forfeiture Act, sections 932.701-932.707, Florida Statutes (1993) (hereinafter Forfeiture Act) in that the warrantless seizure of White's automobile was based upon probable cause to believe that the vehicle had facilitated illegal drug activity at some time in the past. Further, the majority found that the warrantless seizure did not violate White's Fourth Amendment right to be secure against unreasonable searches and seizures.[3] In dissent, Judge Wolf asserted that the "warrantless seizure of an automobile absent exigent circumstances violates the Fourth Amendment of the United States Constitution even though probable cause exists to believe that the automobile is subject to forfeiture as

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[3]"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amend. IV, U.S. Const. In 1982, article I, section 12 of the Florida Constitution was amended to add what has become known as the conformity clause because "we are bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment and provide no greater protection than those interpretations." Bernie v. State, 524 So. 2d 988, 990-91 (Fla. 1988); see Soca v. State, 673 So. 2d 24, 27 (Fla.), cert. denied, 117 S. Ct. 273 (1996).

a result of prior narcotics transactions." White, 680 So. 2d at 557 (Wolf, J., concurring in part and dissenting in part).

Because the court found that neither this Court nor the United States Supreme Court had addressed the issue of whether law enforcement agencies must obtain a warrant prior to seizing a citizen's property under the Florida Contraband Forfeiture Act, the First District certified the issue as one of great public importance to this Court.

LAW AND ANALYSIS

In holding that no prior court authorization was required in order to seize and search White's vehicle, the First District majority applied the "automobile exception" to the warrant requirement. While we recognize the continuing validity of the "automobile exception" to the warrant requirement, we find it inapposite here.

In his dissent, Judge Wolf relied primarily on the opinion of the United States Court of Appeals for the Second Circuit in U.S. v. Lasanta, 978 F.2d 1300 (2d Cir. 1992).[4]

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[4]Because Lasanta contains a comprehensive and reasoned treatment of this issue, we quote from the Second Circuit's opinion at length:

> A threshold question presented here is whether the government's seizure of the car, without a warrant, as a civil forfeiture, was authorized. The forfeiture statute, 21 U.S.C. §881, gives power to the attorney general to seize for forfeiture, inter alia, a vehicle that is used to facilitate a narcotics transaction. In carrying out such a statutorily authorized seizure, however, agents of the attorney general must also obey the constitution, particularly the fourth amendment's command that there be no unreasonable seizures.
>
> . . . .

> We find no language in the fourth amendment suggesting that the right of the people to be secure in their "persons, houses, papers, and effects" applies to all searches and seizures except civil-forfeiture seizures in drug cases. U.S. Const. amend. IV. We reject out of hand the government's argument that congress can conclusively determine the reasonableness of these warrantless seizures, and thereby eliminate the judiciary's role in that task of constitutional construction. See U.S. Const. art. VI, cl. 2. While congress may have intended civil forfeiture to be a "powerful weapon in the war on drugs", United States v. 141st Street Corp. by Hersh, 911 F.2d 870, 878 (2d Cir. 1990) (noting statute's legislative history), cert. denied, 498 U.S. 1109, 111 S. Ct. 1017, 112 L. Ed. 2d 1099 (1991), it would, indeed, be a Pyrrhic victory for the country, if the government's relentless and imaginative use of that weapon were to leave the constitution itself a casualty.
>
> . . . .
>
> To be valid, therefore, this warrantless seizure must meet one of the recognized exceptions to the fourth amendment's warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032, 29 L. Ed. 2d 564 (1971). Surely the government cannot argue that the canister, tucked underneath the driver's seat, was found in the plain view of an investigative officer in a place she was entitled to be. See, e.g., Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) (explaining the elements of a plain-view seizure). Nor does the government claim that the search was incident to Cardona's arrest, which occurred on the doorstep of Cardona's home. See, e.g., Chimel v. California, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2039-40, 23 L. Ed. 2d 685 (1969) (police may search arrestee's person and area within his immediate control incident to arrest). The substantial distance between the site of Cardona's arrest and the vehicle in the driveway forecloses any question of the agents' need to search the vehicle for weapons to ensure their safety during the arrest. Chimel, 395 U.S. at 763, 89 S. Ct. at

He also noted this Court's opinion in Department of Law Enforcement v. Real Property, 588 So. 2d 957, 963 n.14 (Fla. 1991), wherein we recognized that because "article I, section 12 of the Florida Constitution expressly requires conformity with the fourth amendment of the United States Constitution,

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2040 (noting that safety animates this seizure rationale).

> The government does not even suggest that exigent circumstances might justify its warrantless seizure of the vehicle. See, e.g., Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970) (outlining the automobile exception to the warrant requirement); Carroll v. United States, 267 U.S. 132, 146, 45 S. Ct. 280, 282, 69 L. Ed. 543 (1925) (noting rationale of automobile exception). Investigative agents could have held no realistic concern that the car, parked not in a public thoroughfare, but in Cardona's private driveway, might be removed and any evidence within it destroyed in the time a warrant could be obtained. Cardona was not operating the vehicle, nor was he in it or even next to it; when the agents knocked on his door to arrest him, he was inside his house, asleep.
>
> Nor was it impractical for the agents to obtain a warrant to seize Cardona's car. See, e.g., United States v. Paroutian, 299 F.2d 486, 488 (2d Cir. 1962) (search upheld when exceptional circumstances rendered it impractical to secure warrant). Previous surveillance had made agents aware of the vehicle's presence, thus enabling them to have requested and obtained a search warrant during either of their two attempts to secure a warrant to arrest Cardona. Even if the agents had been surprised by the presence of the limousine, and even if they harbored probable cause to suspect it contained evidence of narcotics-related activity, they still could have posted an agent to remain with the vehicle, and then secured a search warrant.

Id. at 1303-06. This reasoning is sound and speaks for itself.

the warrant requirement of article I, section 12 also applies to seizures in forfeiture actions under Florida law." White, 680 So. 2d at 558 (Wolf, J., concurring in part and dissenting in part).

DEPARTMENT OF LAW ENFORCEMENT

In Department of Law Enforcement, we were able to uphold the constitutionality of Florida's forfeiture act only by imposing numerous restrictions and safeguards on the use of the act in order to protect a citizen's property from arbitrary action by the government. In discussing the act we declared:

> The Act raises numerous constitutional concerns that touch upon many substantive and procedural rights protected by the Florida Constitution. In construing the Act, we note that forfeitures are considered harsh exactions, and as a general rule they are not favored either in law or equity. Therefore, this Court has long followed a policy that it must strictly construe forfeiture statutes.

588 So. 2d at 961. The major thrust of our holding was that in order to comply with constitutional due process requirements, the government must strictly observe a citizen's constitutional protections when invoking the drastic remedy of forfeiture of a citizen's property. In addition to expressly holding that the Fourth Amendment applies to forfeiture attempts by the government, we specifically explained:

> In those situations where the state has not yet taken possession of the personal property that it wishes to be forfeited, the state may seek an ex parte preliminary hearing. At that hearing, the

> court shall authorize seizure of the personal property if it finds probable cause to maintain the forfeiture action.

Id. at 965. We conclude that the government's unauthorized and warrantless seizure, absent exigent circumstances not established here, clearly violated the constitutional safeguards we recognized in Department of Law Enforcement.

The government did not seek a warrant or an "ex parte preliminary hearing" here in order to secure a neutral magistrate's determination of probable cause. The government just seized the property, thereby putting the property owner and any others claiming an interest in the property in the position of having to take affirmative action against the government in order to protect their rights. This is the very antithesis of the cautious procedure we mandated in Department of Law Enforcement. We simply cannot accept the government's position that it may act at anytime, anywhere, and regardless of the existence of exigent circumstances, or a change in ownership or possession, to seize a citizen's property once believed to have been used in illegal activity, without securing the authorization of a neutral magistrate.

AUTOMOBILE EXCEPTION

As previously noted, the only basis asserted for the unauthorized government seizure here is the so-called automobile exception to the warrant requirement. The district court majority cited California v. Carney, 471 U.S. 386, 391 (1985), for the proposition that automobiles are afforded less Fourth Amendment protection against warrantless searches and seizures due to their "ready mobility" and diminished expectations of privacy due to their pervasive governmental regulation. The automobile exception is predicated upon the

existence of exigent circumstances consisting of the known presence of contraband in the automobile at the time, combined with the likelihood that an opportunity to seize the contraband will be lost if it is not immediately seized because of the mobility of the automobile. See Chambers v. Maroney, 399 U.S. 42 (1970). For example, in Carney, law enforcement officers had direct evidence[5] that illegal drugs were present and that the suspect was distributing illegal drugs from the vehicle. Accordingly, the Court concluded that the officers "had abundant probable cause to enter and search the vehicle for evidence of a crime." Carney, 471 U.S. at 395.

Since it is conceded that the government had no probable cause to believe that contraband was present in White's car, we conclude that Carney and the automobile exception are inapposite as authority. There is a vast difference between permitting the immediate search of a movable automobile based on actual knowledge that it then contains contraband and that an opportunity to seize the contraband may be lost if not acted on immediately, and the altogether different proposition of permitting the discretionary seizure of a citizen's automobile based upon a belief that it may have been used at some time in the past to assist in illegal activity. The exigent circumstances implicit in the former situation are simply not present in the latter situation.

The automobile exception is a narrow, situation-dependent exception which requires much more than the fact that an automobile is the object sought to be seized and searched. Critically, there must be probable cause to believe contraband

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[5]A young man who had just left the motor home only moments before told agents of the Drug Enforcement Administration that he had received marijuana from the suspect while in the motor home. Carney, 471 U.S. at 388.

is in the vehicle at the time of the search and seizure, Carney,[6] and there must be some legitimate concern that the automobile "might be removed and any evidence within it destroyed in the time a warrant could be obtained." Lasanta, 978 F.2d at 1305. The majority opinion below simply failed to address the fundamental requirement of Carney:

> In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause [to believe contraband is in the vehicle] is met.

471 U.S. at 392 (emphasis added).

As is vividly demonstrated in the Lasanta case, cited by Judge Wolf, the automobile exception does not apply to either the facts of that case or White's case. See White, 680 So. 2d at 557 (Wolf, J., concurring in part and dissenting in part) (noting that White was arrested at his workplace, his car keys were in his pocket, and his car was parked outside in his company's parking lot). In Lasanta, the court could easily have been writing about this case when it described the obvious absence of exigent circumstances in the government's forfeiture seizure:

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[6]See also Pennsylvania v. Labron, 116 S. Ct. 2485, 2487 (1996) (reaffirming Carney in reasoning that if a car "is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more"); California v. Acevedo, 500 U.S. 565, 580 (1991) (holding that "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained").

> The government does not even suggest that exigent circumstances might justify its warrantless seizure of the vehicle. See, e.g., Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970) (outlining the automobile exception to the warrant requirement); Carroll v. United States, 267 U.S. 132, 146, 45 S. Ct. 280, 282, 69 L. Ed. 543 (1925) (noting rationale of automobile exception). Investigative agents could have held no realistic concern that the car, parked not in a public thoroughfare, but in Cardona's private driveway, might be removed and any evidence within it destroyed in the time a warrant could be obtained. Cardona was not operating the vehicle, nor was he in it or even next to it; when the agents knocked on his door to arrest him, he was inside his house, asleep.

978 F.2d at 1305. Similarly, the absence of probable cause to believe contraband was in the vehicle combined with an obvious lack of any other exigent circumstances renders the automobile exception inapplicable here. The exception does not apply when no probable cause exists and the police arrest either a sleeping suspect, Lasanta, or a suspect at work with the keys in his pocket. White. There simply was no concern presented here that an opportunity to seize evidence would be missed because of the mobility of the vehicle. Indeed, the entire focus of the seizure here was to seize the vehicle itself as a prize because of its alleged prior use in illegal activities, rather than to search the vehicle for contraband known to be therein, and that might be lost if not seized immediately.

SEIZURE OF PROPERTY VS. SEIZURE OF PERSON

Finally, the reasoning of the district court majority, that since a defendant's person can be seized without a warrant his property should be no different, simply proves too much. If we were to follow that reasoning to its logical conclusion we would, in essence, amend the Fourth Amendment out of the Constitution and do away with the requirement of a warrant entirely for the search and seizure of property.[7] It will always be more intrusive to seize a person than it will be to seize his property. That is the nature of human values. However, such an approach would apparently have us do away with the constitutional law of search and seizure as to property entirely, simply because we have permitted the warrantless arrest of a person.

The United States Supreme Court has purposely subjected the Fourth Amendment to only a "few well-delineated exceptions." Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). For example, the courts have carefully restricted the law of search and seizure to permit a limited search of an arrestee and his person "incident" to a valid arrest. See Chimel v. California, 395 U.S. 752 (1969). However, the reasoning of the district court majority, if carried to its logical bounds, would do away with the limitations established to a search incident to a lawful arrest and now permit a search of anything, anywhere, based upon probable cause, without a warrant, since those actions involving property would obviously be less

[7]As Chief Justice Kogan recently reminded us, the genius of our federal and state constitutions is that they define basic rights that neither the legislative nor executive branches can modify. Krischer v. McIver, 697 So. 2d 97, 112 (Fla. 1997) (Kogan, C.J., dissenting). These remarkable documents fenced off from the "ordinary political process" these rights guaranteed all Americans by ensuring they "could not be repealed by a mere majority vote of legislators nor . . . alter[ed] through any process except constitutional amendment." Id. at 112-13.

intrusive than seizing the person. Obviously, we are not willing to accept such a proposition and its implications.[8]

CONCLUSION

In the end, the maintenance of an orderly society mandates that a citizen's property should not be taken by the government, in the absence of exigent circumstances, without the intervention of a neutral magistrate. Certainly the warrant requirement would have posed no undue burden on the government here where the vehicle was parked safely at the petitioner's place of employment and the government had the keys and the petitioner in custody. Moreover, any

[8]As Judge Wolf correctly observed in his dissent below, the Fourth Amendment mandates that absent exigent circumstances, police must secure a warrant for the search and seizure of an automobile. Coolidge v. New Hampshire, 403 U.S. 443 (1971). Indeed, Coolidge's holding remains good law to the extent that "no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'" Id. at 468. Moreover, in the case that overruled Coolidge in part, Horton v. California, 496 U.S. 128 (1990), the Supreme Court not only reaffirmed Coolidge's essential holding but also noted that it had extended "the same rule to the arrest of a person in his home." Id. at 137 n.7. Therefore, since no exigent circumstances existed in this case, the warrantless seizure of White's car was unconstitutional. See Coolidge, 403 U.S. at 454-55 (reaffirming rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions") (emphasis added). Even though automobiles are afforded lesser Fourth Amendment protection, there is still a strong presumption against warrantless searches and seizures of a citizen's property by the government, absent exigent circumstances. See Coolidge, 403 U.S. at 468 (reiterating that "even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure"). Coolidge's requirement that a "plain view" seizure must also be "inadvertent" was overruled in Horton, 496 U.S. at 140. Minus that incidental reasoning, Coolidge remains good law.

inconvenience to the government pales in comparison to the consequences for our justice system and constitutional order if such abuses are left unchecked. See Department of Law Enforcement. As the Second Circuit poignantly observed in Lasanta, 978 F.2d at 1305, "it would, indeed, be a Pyrrhic victory for the country, if the government's imaginative use of that weapon [civil forfeiture] were to leave the constitution itself a casualty."

In summary, we answer the certified question in the affirmative and hold that the warrantless seizure of a citizen's property is protected by the federal and Florida constitutions even when the seizure is made pursuant to a statutory forfeiture scheme. Accordingly, we quash the First District's opinion and remand this case for proceedings consistent herewith.

It is so ordered.

KOGAN, C.J., SHAW and HARDING, JJ., and GRIMES, Senior Justice, concur.
WELLS, J., dissents with an opinion, in which OVERTON, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

WELLS, J., dissenting.

For more than twenty-three years, Florida's forfeiture statute has been enforced by Florida courts, including this Court, as the legislature wrote it. Today, by this decision, the majority judicially amends this twenty-three-year-old statute and places Florida in the minority of federal and state jurisdictions, which require a preseizure warrant in order to enforce forfeiture statutes. Today's decision also puts our state

procedure at odds with federal forfeitures in Florida since the Eleventh Circuit is among the majority of jurisdictions which recognize that warrantless seizures pursuant to forfeiture statutes are not in violation of the Fourth Amendment to the United States Constitution.

I dissent because I agree with the majority of jurisdictions and the Eleventh Circuit and do not believe that this change in the law of Florida is suddenly required by the Fourth Amendment. The case of United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992), upon which the majority opinion relies, is clearly the minority view.

The seizure in this case was not an unusual enforcement of Florida's forfeiture law or contrary to forfeitures which the appellate courts of Florida have approved since the inception of the statute. Clearly, the period of time between when the police eyewitnesses and the video-tape evidence showed the vehicle being used in the delivery and sale of cocaine and the seizure of the vehicle was within previous approvals by Florida courts. Soon after the forfeiture statute became effective on October 1, 1974, it was recognized that proof of past violations may be the basis for forfeiture. State v. One 1977 Volkswagen, 455 So. 2d 434 (Fla. 1st DCA 1984) (police properly seized a vehicle based upon drug transaction occurring almost two months prior to seizure), approved, 478 So. 2d 347 (Fla. 1985); Knight v. State, 336 So. 2d 385, 387 (Fla. 1st DCA 1976), cert. denied, 345 So. 2d 427 (Fla. 1997).

In 1983, the Second District directly confronted the issue of whether a preseizure warrant needed to be obtained. The Second District held that it did not in State v. Pomerance, 434 So. 2d 329, 330 (Fla. 2d DCA 1983), stating:

> We have found no case addressing this issue. However, section 932.703, Florida Statutes (1981), which provides for the forfeiture of motor vehicles used to transport, conceal, or facilitate the sale of contraband, in violation of section 932.703, nowhere mentions obtaining a warrant; it simply states that an offending vehicle "shall be seized." We know of no rationale for judicially engrafting onto the statute a requirement that a warrant be obtained.

(Emphasis added.)

In 1985, in Duckham v. State, 478 So. 2d 347 (Fla. 1985), this Court did an analysis of the forfeiture statute and cases from our district courts and federal circuit courts and upheld the forfeiture of a motor vehicle seized almost two months after the vehicle had been used to facilitate a drug transaction. It is important to note that this seizure of the motor vehicle was not based upon there being probable cause to believe that there was contraband in the vehicle at the time of or before its seizure. The district court's decision in Duckham was approved with this Court noting:

> Even though no drugs had been transported in the car, no conversations had taken place in the car, the policeman had never been in the car, and Duckham used the car solely to transport himself to the restaurant where he struck the deal and then to his apartment, the district court found that Duckham used his car to facilitate the sale of contraband within the meaning of subsection 932.702(3), Florida Statutes (1981).

478 So. 2d at 348.

Also in 1985, this Court upheld the forfeiture statute against a due-process attack in Lamar v. Universal Supply Co., Inc., 479 So. 2d 109 (Fla. 1985). This Court specifically stated:

> The seizure of property pursuant to a forfeiture statute constitutes an extraordinary situation in which postponement of notice and hearing until after seizure does not deny due process. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974). The due process rights of claimants are adequately protected, therefore, by the requirement that the state attorney promptly file a forfeiture action following seizure. § 932.704(1), Fla. Stat. (1983).

479 So. 2d at 110.

In 1989, in an opinion written by Justice Overton, this Court did another extensive analysis of this statute in State v. Crenshaw, 548 So. 2d 223 (Fla 1989), and strongly upheld the enforcement of this statute.

The majority here cites to this Court's 1991 analysis of the forfeiture statute in Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991). However, the majority's quote omits the following sentence which completes the paragraph from which the quote in the majority opinion is taken: "In those situations where a law enforcement agency already has lawfully taken possession of personal property during the course of routine police action, the state has effectively made an ex parte seizure for the purposes of initiating a forfeiture action." 588 So. 2d at 965. Through the date of that opinion (in fact until today) law enforcement agencies were considered to have lawfully taken possession of personal property when possession was taken on the basis of

and in conformity with the forfeiture statute. Lamar, 479 So. 2d at 110.

When Department of Law Enforcement is read in full context, that decision cannot be fairly said to engraft a warrant requirement into the statute. This was the reading given to that decision by the Second District in In re Forfeiture of 1986 Ford, 619 So. 2d 337, 338 (Fla. 2d DCA 1993), when it held that "nothing in [Department of Law Enforcement] or the forfeiture statute requires a warrant, consent or exigent circumstances."

Furthermore, the majority opinion here incorrectly states that "the only basis asserted for the unauthorized government seizure here is the so-called automobile exception to the warrant requirement." Majority op. at __. What the district court actually said was, "We are also influenced in our holding by the fact that the property seized here was a motor vehicle . . . ." White v. State, 680 so. 2d 550, 554 (Fla. 1st DCA 1996). The district court's opinion therefore correctly pointed out that privacy interests in a motor vehicle have a lesser degree of Fourth Amendment protection because of a vehicle's mobility and because the expectation of privacy is less than that relating to one's home or office, citing to California v. Carney, 471 U.S. 386 (1985). The statement by the district court majority is indisputably correct.

However, the clear reason for the district court majority's decision is the compelling development of precedent in Florida in respect to the statute, which the majority in this Court simply casts aside without mention, and the weight of authority from both federal and state jurisdictions, which the majority fails to acknowledge. One case representing the majority view is from the Eleventh Circuit: United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989). The district court majority followed the

reasoning of the Eleventh Circuit in Valdes. The rejection of Valdes by this Court's majority places Florida in the illogical (and I believe untenable) situation of there being a warrantless seizure available to federal law enforcement pursuant to the federal forfeiture statute because it is not a violation of the Fourth Amendment to the United States Constitution and a warrantless seizure not being available to Florida law enforcement pursuant to a substantially similar state forfeiture statute because of a holding by this Court that a warrantless seizure is in violation of the Fourth Amendment to the United States Constitution. Though we are not bound to do it, I believe this Court should apply the Fourth Amendment to the United States Constitution in accord with its application by the federal circuit court that has Florida within its jurisdiction. This is particularly so when the Eleventh Circuit's decision is in accord with the majority of other jurisdictions.

I believe the Seventh Circuit clearly expressed correctly the state of the law in federal and state jurisdictions in United States v. Pace, 898 F.2d 1218, 1241 (7th Cir. 1990), when it said:

> The weight of authority, however, holds that police may seize a car without a warrant pursuant to a forfeiture statute if they have probable cause to believe the car is subject to forfeiture. See, e.g., United States v. Valdes, 876 F.2d 1554, 1558-60 (11th Cir. 1989); United States v. $29,000--U.S. Currency, 745 F.2d 853, 856 (4th Cir. 1984); United States v. One 1978 Mercedes Benz, 711 F.2d 1297, 1302 (5th Cir. 1983); United States v. One 1977 Lincoln Mark V Coupe, 643 F.2d 154, 158 (3d Cir. 1981); United States v. One 1975 Pontiac LeMans, 621 F.2d 444, 450 (1st Cir. 1980) (citing cases). We agree with the majority

approach. The federal courts' overwhelming approval of warrantless forfeiture seizures based on probable cause, along with the historical acceptance of the constitutionality of such searches, are evidence that such searches have been generally accepted as reasonable. See United States v. Bush, 647 F.2d 357, 370 (3d Cir. 1981) (citing cases). It is difficult to ignore this general acceptance. Furthermore, under a civil forfeiture statute, "the vehicle . . . is treated as being itself guilty of wrongdoing." United States v. One Mercedes Benz 280S, 618 F.2d 453, 454 (7th Cir. 1980). Thus, seizing a car from a pubic place based on probable cause is analogous to arresting a person outside the home based on probable cause. Such an arrest, even without a warrant, does not violate the Fourth Amendment, although it is possibly a more significant intrusion on privacy interests than seizing an unoccupied car. See Bush, 647 F.2d at 370 (citing United States v. Watson, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976)); see also Valdes, 876 F.2d at 1559; One 1978 Mercedes Benz, 711 F.2d at 1302. And the Supreme Court has approved warrantless seizures in a similar situation. In G.M. Leasing Corp. v. United States, 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977), Internal Revenue Service agents seized cars subject to tax liens without a warrant. The Court held that the seizures did not violate the Fourth Amendment; the agents had probable cause to believe that the cars were subject to seizure, and the seizures took place "on public streets, parking lots, or other open places." See id. at 351-52, 97 S. Ct. at 627-28; G.M. Leasing provides strong support for the majority position. See One 1975 Pontiac

> LeMans, 621 F.2d at 450, which adopted the panel's reasoning in United States v. Pappas, 600 F.2d 300, 304 (1st Cir.), vacated 613 F.2d 324 (1st Cir. 1979); Bush, 647 F.2d at 369; see also 3 Wayne R. LaFave, Search and Seizure § 7.3(b), at 83 (2d ed. 1987). For all these reasons, we conclude that it was proper for the police to seize Pace's and Besase's cars from the parking lot of Savides' condominium complex, if the police had probable cause to believe the cars were subject to forfeiture.

(Emphasis added; footnote omitted.) See also United States v. Musa, 45 F.3d 922, 924 (5th Cir. 1995). I would continue Florida's adherence to this view.

Assuming that the warrantless seizure was authorized, there is no doubt that the inventory search was appropriate. See Caplan v. State, 531 So. 2d 88 (Fla. 1988); Padron v. State, 449 So. 2d 811 (Fla. 1984).

OVERTON, J., concurs.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

First District - Case No. 94-2823

(Bay County)

Nancy A. Daniels, Public Defender and David P. Gauldin, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida,

for Petitioner

Robert A. Butterworth, Attorney General; James W. Rogers, Bureau Chief, Criminal Appeals and Daniel A. David, Assistant Attorney General, Tallahassee, Florida,

for Respondent

SUPREME COURT OF FLORIDA

MONDAY, JUNE 1, 1998

TYVESSEL TYVORUS WHITE,	*
	*
Petitioner,	*
	* CASE NO. 88,813
v.	* District Court of Appeal
	* 1st District-No.94-2823
STATE OF FLORIDA,	*
	*
Respondent.	*
	*

****

Respondent's Motion for Rehearing is hereby denied.

KOGAN, C.J., SHAW, HARDING and ANSTEAD, JJ., and GRIMES, Senior Justice, concur.
OVERTON and WELLS, JJ., dissents.

A True Copy TC

cc: Hon. Jon S. Wheeler, Clerk
Hon. Harold Bazzel, Clerk
Hon. Clinton E. Foster, Judge
Mr. David P. Gauldin
Mr. James W. Rogers
Mr. Daniel A. David

TEST

Sid J. White
Clerk, Supreme Court

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

Tyvessel Tyvorus WHITE, Appellant,
v.
STATE of Florida, Appellee.

No. 94-2823.

July 29, 1996.

Defendant was convicted in the Circuit Court, Bay County, Clinton Foster, J., of possession of cocaine, which was found during inventory search of his automobile following its warrantless seizure pursuant to Florida Contraband Forfeiture Act. Defendant appealed. On motion for certification, the District Court of Appeal, Van Nortwick, J., held that: (1) Act authorized warrantless seizure of vehicle based on probable cause to believe that defendant had previously used vehicle to facilitate sale of cocaine; (2) Act did not violate Fourth Amendment; and (3) defendant's pre-*Miranda* statement was involuntary.

Affirmed.

Wolf, J., issued concurring and dissenting opinion.

Nancy A. Daniels, Public Defender; David P. Gauldin, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Douglas Gurnic, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR CERTIFICATION

VAN NORTWICK, Judge.

We grant appellant's motion for certification, withdraw our prior opinion in this cause, substitute the following opinion in its stead, and certify a question of great public importance to the Florida Supreme Court.

Tyvessel Tyvorus White appeals his judgment and sentence for possession of cocaine. White argues that the trial court erred in denying his motion to suppress the introduction into evidence of cocaine found in White's car during a warrantless inventory search of the car following its seizure pursuant to the Florida Contraband Forfeiture Act, sections 932.701–932.707, Florida Statutes (1993), and in failing to exclude the testimony of a police officer relating to a prejudicial statement made by White prior to receiving "*Miranda* warnings." (FN1) Because we conclude (i) that the police had probable cause to seize White's vehicle under the Forfeiture Act and the subsequent inventory search of the seized car was a reasonable procedural measure and (ii) that White's statement was freely and voluntarily given without interrogation or its functional equivalent, we affirm.

Factual and Procedural Background

In October 1993, White was arrested at his place of employment by police officers with the Bay County Joint Narcotics Task Force and charged with the sale of a controlled substance. (FN2) Prior to his arrest, the arresting police officers had determined to seize White's automobile under the Forfeiture Act on the grounds that, based on police eye-witnesses and videotape, it had been used in the delivery and

sale of cocaine. As contemplated by the Forfeiture Act, section 932.703, Florida Statutes (1993), no prior court order or warrant was issued authorizing the seizure. The car was seized and removed to the task force headquarters, where a routine inventory search revealed two pieces of crack cocaine in the ashtray. Based on the seizure of this crack cocaine, White was also charged with possession of a controlled substance, his conviction for which is the subject of the instant appeal.

White was also transported to the task force headquarters. Prior to the arresting officer reading White his constitutional warnings, and during the course of the officer explaining to White the charges for which he was arrested, White remarked that "He had recently got back into the business." Because of prior discussions between the arresting officer and White, the officer understood the "business" to mean the sale of cocaine.

White moved to suppress the cocaine seized during the search of his car and, at trial, objected to the introduction of his statements made prior to receiving the *Miranda* warnings. The trial court reserved ruling on these issues and allowed the evidence and statements to go to the jury. White was found guilty as charged. At a subsequent hearing, White's suppression motion was denied.

Forfeiture Seizure and Subsequent Search

On appeal, White argues that the trial court should have suppressed the cocaine seized from his car. He contends that the seizure of his vehicle was impermissible since it was made without warrant or probable cause and the subsequent search was unreasonable under the Fourth Amendment since the forfeiture seizure was improper and the police had no probable cause to search the vehicle.

The Florida Contraband Forfeiture Act authorizes law enforcement agencies to seize vehicles "of any kind" used "to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article." s 932.701(2)(a)5; 932.702(3), Fla. Stat. (1993). The Forfeiture Act defines "contraband article" to include "any controlled substance as defined in chapter 893." s 932.701(2)(a)1, Fla. Stat. (1993). Chapter 893 includes cocaine and its derivatives in its list of controlled substances. s 893.03(2)(a)4, Fla. Stat. (1993). Thus, the Forfeiture Act clearly authorizes the police to seize vehicles used to facilitate the sale of cocaine.

The Forfeiture Act sets forth the procedure to be used in seizing personal property, as follows:

> Personal property may be seized at the time of the violation or subsequent to the violation, provided that the person entitled to notice is notified at the time of the seizure or by certified mail, return receipt requested, that there is a right to a(sic) adversarial preliminary hearing after the seizure to determine whether probable cause exists to believe that such property has been or is being used in violation of the Florida Contraband Forfeiture Act.

s 932.703(2)(a), Fla. Stat. (1993). A post-seizure adversarial preliminary hearing may be requested within 15 days after receipt of this notice and the hearing must be set and noticed by the seizing agency and held by the court within 10 days of receipt of the hearing request or as soon as practicable thereafter. *Id.* At the hearing, the court must determine whether probable cause existed for the seizure. s 932.703(2)(a), Fla. Stat. (1993). Thus, the only pre-seizure procedural requirement under the Forfeiture Act is the giving of a notice

of the right to a subsequent hearing. Here, White does not claim this notice requirement was violated.

White's argument that to seize his car under the Forfeiture Act the police were required to have probable cause to believe the vehicle contained contraband at the time of seizure is without merit. Under the Forfeiture Act, the seizing agency is required only to have probable cause to believe that the property sought to be seized "was used, is being used, was attempted to be used, or was intended to be used" in violation of the Forfeiture Act. s 932.703(2)(c), Fla. Stat. (1993). The fact that the police, as here, did not have probable cause to believe the vehicle contained contraband or was being used in violation of the Forfeiture Act at the moment they seized the vehicle does not render the seizure unlawful under the Act. Having probable cause to believe there was prior usage of the vehicle in violation of the Forfeiture Act is sufficient. (FN3) *See, Knight v. State,* 336 So.2d 385, 387 (Fla. 1st DCA 1976), *cert. denied,* 345 So.2d 424 (Fla.1977)(Forfeiture Act "clearly contemplates that proof of past violations of the act may provide the basis for forfeiture."); *State v. One (1) 1977 Volkswagen,* 455 So.2d 434 (Fla. 1st DCA 1984), *approved,* 478 So.2d 347 (Fla.1985)(police properly seized a vehicle based upon a drug transaction occurring almost two months prior to the seizure); *In re Forfeiture of 1979 Toyota Corolla,* 424 So.2d 922, 924 (Fla. 4th DCA 1982)("[T]ransportation by automobile of a key figure to the site of a drug transaction constitutes a sufficient nexus to justify the forfeiture of the car.").

Similarly, White's argument that the police were required to obtain a warrant or court order before seizing the vehicle is without merit. Nothing in the Forfeiture Act requires the obtaining of a warrant or court order before seizing a vehicle. *See, State v. Pomerance,* 434 So.2d 329, 330 (Fla. 2d DCA

1983)(The Forfeiture Act "nowhere mentions obtaining a warrant; it simply states that an offending vehicle 'shall be seized.' We know of no rationale for judicially engrafting onto the statute a requirement that a warrant be obtained."); *In re Forfeiture of 1986 Ford PU,* 619 So.2d 337, 338 (Fla. 2d DCA 1993)(Forfeiture Act does not require a warrant, consent, or exigent circumstances prior to seizing a vehicle used in violation of the statute).

The fact that the Florida Legislature has authorized by statute the warrantless seizure of a vehicle based upon probable cause that it had been used to facilitate a drug transaction, however, does not end our inquiry. The further question raised here is whether such a warrantless seizure of a motor vehicle violates constitutional prohibitions against illegal search and seizure. (FN4) We hold that it does not.

Neither the Florida nor United States Supreme Court has directly addressed whether the Fourth Amendment requires law enforcement officers to obtain a warrant prior to seizing a vehicle under the Florida Forfeiture Act or similar statute. The Florida Forfeiture Act, however, is substantively similar to the federal forfeiture statute, *see,* 21 U.S.C. s 881, and the Uniform Controlled Substances Act, *see,* 9 U.L.A. s 505. Thus, decisions of federal courts and courts of certain sister states are useful to our consideration here.

The federal circuits are split in their analysis of this issue. The majority of the circuits that have considered this question have held that a warrantless seizure of a vehicle under the federal forfeiture act does not violate the Fourth Amendment and that evidence obtained in a subsequent inventory search is admissible in a criminal prosecution. *U.S. v. Decker,* 19 F.3d 287 (6th Cir.1994); *U.S. v. Pace,* 898 F.2d 1218 (7th Cir.1990); *U.S. v. Valdes,* 876 F.2d 1554 (11th Cir.1989);

U.S. v. One 1978 Mercedes Benz, Four-Door Sedan, 711 F.2d 1297 (5th Cir.1983); *U.S. v. Kemp,* 690 F.2d 397 (4th Cir.1982); *U.S. v. Bush,* 647 F.2d 357 (3d Cir.1981). Only three circuits have held the procedure in question to have been a violation of a defendant's Fourth Amendment rights. *See, U.S. v. Dixon,* 1 F.3d 1080 (10th Cir.1993); *U.S. v. Lasanta,* 978 F.2d 1300 (2d Cir.1992); *U.S. v. $149,442.43 in U.S. Currency,* 965 F.2d 868 (10th Cir.1992); *U.S. v. Linn,* 880 F.2d 209 (9th Cir.1989). (FN5) We have examined these federal decisions and find the rationale employed by the majority view to be persuasive.

Several state appellate courts have also addressed this issue. For example, in *State v. McFadden,* 63 Wash.App. 441, 820 P.2d 53, 57 (Wash.App.1991), *rev. denied,* 119 Wash.2d 1002, 832 P.2d 487 (Wash.1992), the Washington court held:

> We hold that a motor vehicle seized pursuant to [Washington forfeiture statute] on probable cause that it is used to facilitate a drug transaction is subject to a valid inventory search and evidence found in the course of such a search is admissible at trial.

See also, Lowery v. Nelson, 43 Wash.App. 747, 719 P.2d 594 (Wash.App.1986), *rev. denied,* 106 Wash.2d 1013 (1986); *State v. Brickhouse,* 20 Kan.App.2d 495, 890 P.2d 353 (1995); *c.f., Davis v. State,* 813 P.2d 1178 (Utah 1991).

We join the majority of the federal and state jurisdictions which have considered this issue and hold that a warrantless seizure of a motor vehicle based on probable cause that the vehicle was used in violation of the Forfeiture Act does not violate the Fourth Amendment prohibition against unreasonable searches and seizure. Although the decisions upholding a warrantless forfeiture seizure state various reasons, we prefer

the rationale adopted by the Eleventh Circuit in *U.S. v. Valdes,* 876 F.2d at 1559-60. In *Valdes,* in upholding under the Fourth Amendment a seizure and subsequent inventory search of an automobile under the federal forfeiture statute, the court reasoned and held:

> If federal law enforcement agents, armed with probable cause, can arrest a drug trafficker without repairing to the magistrate for a warrant, we see no reason why they should not also be permitted to seize the vehicle the trafficker has been using to transport his drugs. Appellants would have us accord the trafficker's property interest greater deference than his liberty interest; they seem to suggest that the injury caused by erroneous detention (i.e. the period of time between seizure, or arrest, and the magistrate's ruling ending the detention) is somehow greater in the case of one's property than it is in the case of one's liberty. We are not persuaded. We therefore hold that the warrantless seizures of appellants' automobiles, and the subsequent inventory searches, were not unreasonable under the fourth amendment. (Footnotes omitted).
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> *Id.*

We are also influenced in our holding by the fact that the property seized here was a motor vehicle, a type of property found by the Supreme Court to have less Fourth Amendment protection against warrantless searches and seizures under the so-called "automobile exception," *California v. Carney,* 471 U.S. 386, 390, 105 S.Ct. 2066, 2068, 85 L.Ed.2d 406 (1985). Although privacy interests in a motor vehicle are protected under the Fourth Amendment, under the automobile exception those interests have a lesser degree of protection because "the vehicle can be quickly moved out of the locality or jurisdiction

in which the warrant must be sought," *id.*, 471 U.S. at 390, 105 S.Ct. at 2069, and "because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Id.*, 471 U.S. at 391, 105 S.Ct. at 2069. Thus, a warrantless search and seizure of a motor vehicle may pass constitutional scrutiny absent any exigent circumstances other than the characteristics inherent in a motor vehicle. *Id.* 471 U.S. at 390-91, 105 S. Ct. at 2069. Logically, for the same reasons, a motor vehicle may be seized under a forfeiture statute without a prior warrant. *See e.g., U.S. v. Linn,* 880 F.2d at 215; *U.S. v. $29,000--U.S. Currency,* 745 F.2d 853 (4th Cir.1984).

Because we hold that the police properly seized the appellant's vehicle under the Forfeiture Act, we conclude that the subsequent inventory search was reasonable and, thus, the cocaine seized in the vehicle was properly admitted at trial. *Cooper v. State of California,* 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976)(inventory searches pursuant to standard police procedures are reasonable under Fourth Amendment); *U.S. v. Valdes,* 876 F.2d at 1559-60; *State v. Pomerance,* 434 So.2d 329, 330 (Fla. 2d DCA 1983)(if the defendant's automobile was properly seized under the Forfeiture Act "the search of the trunk of the car was a proper inventory search"). We find *Cooper* directly applicable here. In *Cooper,* the Supreme Court upheld the warrantless search of a vehicle justified solely on the basis that the vehicle was in the lawful custody of the state following its seizure under California's forfeiture statute, ruling:

> It would be unreasonable to hold that the police, having to retain the car in their custody ... had no right, even for their own protection, to search it. It is no answer to say that the police could have obtained a search warrant, for

> "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States v. Rabinowitz,* 339 U.S. 56, 66, 70 S.Ct. 430, 435, 94 L.Ed. 653. Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding.

Cooper, 386 U.S. at 61-62, 87 S.Ct. at 791.

Nevertheless, because we recognize that neither the Florida Supreme Court nor United States Supreme Court has directly addressed the issue presented here, and that the federal circuit courts have reached different conclusions concerning this constitutional issue, we certify to the Florida Supreme Court the following question as one of great public importance:

> WHETHER THE WARRANTLESS SEIZURE OF A MOTOR VEHICLE UNDER THE FLORIDA FORFEITURE ACT (ABSENT OTHER EXIGENT CIRCUMSTANCES) VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION SO AS TO RENDER EVIDENCE SEIZED IN A SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE INADMISSIBLE IN A CRIMINAL PROSECUTION.

Statement Prior to Miranda Warning

White argues that his statement to the police that "[h]e had recently got back into the business" was made while he was in custody during the "functional equivalent" of interrogation and, therefore, violated the requirements of *Miranda.* We find, however, that competent substantial evidence in the record

supports a conclusion that the statement was spontaneously, freely, and voluntarily made and, accordingly, the trial court did not abuse its discretion in admitting the statement into evidence. *Gray v. State,* 640 So.2d 186, 194 (Fla. 1st DCA 1994).

Miranda established that "[p]rior to any questioning, the [suspect] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at 444, 86 S.Ct. at 1612. *Miranda* states, however, that "[a]ny statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence." 384 U.S. at 478, 86 S.Ct. at 1630. Nevertheless,

> the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean
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> > questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

384 U.S. at 444, 86 S.Ct. at 1612. Thus, "[t]he fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated...." 384 U.S. at 478, 86 S.Ct. at 1630.

In *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the Court concluded "that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Id.*, 446 U.S. at 300-301, 100 S.Ct. at 1689. The *Innis* court further concluded that the functional equivalent of interrogation under *Miranda* refers to practices that the police "should know" are "reasonably likely to elicit an incriminating response from the suspect." *Id.*, 446 U.S. at 301, 100 S.Ct. at 1689-1690. This interrogation standard is an objective one which "focuses primarily upon perceptions of the suspect, rather than the intent of the police." *Id.*, 446 U.S. at 301, 100 S.Ct. at 1690.

In the instant case, while the arresting officer was reading the arrest affidavits to White, explaining the charges for which he was arrested, White made the incriminating statement. Although at the time the statement was made, White had not been read his *Miranda* rights, his statement did not come in response to any question posed by the police. Thus, to conclude whether White's statement was properly admissible, it must be determined whether the statement was made voluntarily or through the functional equivalent of interrogation.

The Supreme Court in *Innis* "address[ed] for the first time the meaning of 'interrogation' under *Miranda* ...," *id.* 446 U.S. at 297, 100 S.Ct. at 1687-88, and discussed the two-prong analysis used in determining whether a suspect's statements are freely and voluntarily given or are the result of interrogation or its functional equivalent. In *Innis,* the defendant was arrested for murder, kidnapping and armed robbery, during which he had used a shotgun. *Innis,* 446 U.S. at 294, 100 S.Ct. at 1686. At the time of his arrest he was unarmed. *Id.* After being given his *Miranda* rights and stating that he wanted to speak with a

lawyer he was placed in the back of a police car. *Id.* During the ride to the police station the two arresting officers in the patrol car began a conversation about the missing shotgun, mentioning their concerns that one of the handicapped children from a nearby school might find the gun and injure themselves. *Id.*, 446 U.S. at 294-95, 100 S.Ct. at 1686-87. The defendant interrupted the conversation and stated that he would show the police were the gun was located. *Id.*, 446 U.S. at 295, 100 S.Ct. at 1687. The Supreme Court concluded that at the time the statement was made the defendant was not being interrogated within the meaning of *Miranda*. *Id.*, 446 U.S. at 302, 100 S.Ct. at 1690. The Supreme Court reasoned as follows:

> It is undisputed that the first prong of the definition of "interrogation" was not satisfied, for the conversation between [the] Patrolmen ... included no express questioning of the respondent....
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> Moreover, it cannot be fairly concluded that the respondent was subject to the "functional equivalent" of questioning. It cannot be said, in short, that [the] Patrolmen ... should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent.

Id. The Court went on to explain that, while the officer's comments obviously "struck a responsive chord" in the defendant, the conversation did not amount to the functional equivalent of interrogation. *Id.*, 446 U.S. at 303, 100 S.Ct. at 1691. The Court reasoned that there was

> nothing in the record to suggest that the officers were aware that the respondent was *peculiarly susceptible* to an appeal to his conscience concerning the safety of handicapped children. Nor [was] there anything in the

> record to suggest that the police knew that the respondent was *unusually disoriented or upset* at the time of his arrest.

Id., 446 U.S. at 302-303, 100 S.Ct. at 1690. (Emphasis added). Therefore, the Court found that the record failed to show that the police "should have known" the conversation they had "was reasonably likely to elicit an incriminating response" from the defendant, *id.*, 446 U.S. at 303, 100 S.Ct. at 1691, and held the statement was properly admitted into evidence.

Similarly, in the instant case, it is undisputed that White's statement was not made in response to express questioning. Further, it cannot be fairly concluded that White was subject to the "functional equivalent" of questioning. The arresting officer's act of explaining the charges to White was reasonable and understandable given that White had just been placed under arrest and had asked to know why. Like in *Innis*, the fact that the officer's explanation may have "struck a responsive chord," causing White to interject that "[h]e recently got back into the business," does not constitute the functional equivalent of an interrogation. Nothing in the record indicates to us that the arresting officers should have known that the explanation of charges to White was reasonably likely to elicit an incriminating response. Further, nothing in the record shows that the officers were aware that White was "peculiarly susceptible" or so "unusually disoriented or upset" that simply informing him of the charges would likely evoke incriminating statements. Because we find that White's statement was made freely and voluntarily, and not in response to express questioning or during the functional equivalent of an interrogation, we hold that the statement was properly admissible at trial under *Miranda*. *See also, Hawkins v. State*, 217 So.2d 582, 583 (Fla. 4th DCA 1969).

AFFIRMED.

WEBSTER, J., concurs.

WOLF, J., concurs and dissents with written opinion.

WOLF, Judge, concurring in part and dissenting in part.

I concur in the majority's decision to certify a question to the Florida Supreme Court, but respectfully dissent from their decision to uphold the warrantless seizure of the automobile.

The warrantless seizure of an automobile absent exigent circumstances violates the Fourth Amendment of the United States Constitution even though probable cause exists to believe that the automobile is subject to forfeiture as a result of prior narcotics transactions.

Appellant was arrested at his workplace based upon narcotics transactions unrelated to his present conviction. Officer Pierce was the arresting officer, and he was accompanied by Officer Squire. The purpose of Squire's presence at the arrest was to drive appellant's vehicle which was to be seized for forfeiture because it had been used to sell and deliver cocaine. There was no warrant authorizing seizure of the vehicle.

At the time of appellant's arrest, he had the car keys in his pocket and the vehicle was parked outside in the parking lot of his place of employment. The police seized and searched the vehicle. The subsequent search of the vehicle revealed two pieces of crack cocaine in the ashtray of the car. It is this cocaine which is the subject of the charges in the instant case.

The Fourth Amendment requires that police obtain a warrant for search and seizure of an automobile absent exigent circumstances. *Coolidge v. New Hampshire,* 403 U.S. 443, 91

S.Ct. 2022, 29 L.Ed.2d 564 (1971). While exigent circumstances may justify a warrantless seizure, no such circumstances exist in this case. The state argues, however, that the warrantless seizure is justified based on the fact that probable cause existed to believe that the car was subject to forfeiture. There is no Florida case that directly deals with this issue. In *Department of Law Enforcement v. Real Property,* 588 So.2d 957 (Fla.1991), the court found that notification was not constitutionally mandated prior to a seizure pursuant to the Florida Contraband Forfeiture Act, sections 932.701-932.704, Florida Statutes (1993). The court did not rule directly on whether a warrant was required, but stated,

> The state conceded at oral argument that the fourth amendment applies to the seizure
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> > of property in forfeiture actions, and argued that the fourth amendment protections adequately protect property owners. We fully agree that the fourth amendment applies when there has been a seizure.

Department of Law Enforcement, supra at 963. The court further states in a footnote,

> Since article I, section 12 of the Florida Constitution expressly requires conformity with the fourth amendment of the United States Constitution, *the warrant requirement of article I, section 12 also applies to forfeiture actions under Florida law.*
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> *Id.* at 963 (emphasis added).

The decision of the second district in *In re: Forfeiture of 1986 Ford PU,* 619 So.2d 337 (Fla. 2d DCA 1993), is not inconsistent with the supreme court's statement concerning the

applicability of the Fourth Amendment's warrant requirement. The court ruled that nothing in the case of *Department of Law Enforcement, supra,* or the forfeiture statute specifically requires a warrant, but the court did not specifically rule on whether a warrantless seizure would violate the Fourth Amendment. To the extent that the decision could be argued to support the argument that no warrant is required, it is unpersuasive because no analysis is presented to support this position.

Federal courts which have dealt with the necessity of obtaining a warrant when property is subject to a federal forfeiture statute have reached different conclusions. The ninth circuit has held that a warrantless seizure of an automobile absent exigent circumstances violates the Fourth Amendment, (FN6) notwithstanding probable cause to believe that the car is subject to forfeiture. *UNITED STATES V. MCCORMICK,* 502 F.2D 281 (9TH CIR. 1974); *UNITED STATES V. SPETZ,* 721 F.2D 1457 (9TH CIR.1983). IN *U.S. V. LASANTA,* 978 F.2D 1300 (2ND CIR.1992)(FN7), the court discussed the cases which had upheld the warrantless seizures of automobiles subject to forfeiture and stated,

> We find no language in the fourth amendment suggesting that the right of the people to be secure in their "persons, houses, papers, and effects" applies to all searches and seizures except civil-forfeiture seizures in drug cases.

Id. at 1305. In rejecting the attorney general's argument, the court goes on to state,

> While congress may have intended civil forfeiture to be a "powerful weapon in the war on drugs," it would, indeed, be a Pyrrhic victory for the country, if the government's

> relentless and imaginative use of that weapon were to leave the constitution itself a casualty.

Id. at 1305 (citations omitted).

In *United States v. Valdes,* 876 F.2d 1554 (11th Cir.1989), the 11th circuit, however, justified a warrantless seizure of property subject to forfeiture on the basis that a warrantless arrest of a person may be made based on probable cause, and a person's property is entitled to no greater protection than the person himself. *See also U.S. v. Pace,* 898 F.2d 1218 (7th Cir.1990). Such warrantless seizures have also been upheld based on the lack of reasonable expectation of privacy attached to a car on a public street. *See Pace, supra* at 1242; *U.S. v. Bush,* 647 F.2d 357 (3rd Cir.1981). This line of reasoning is based on a statement in the Supreme Court's opinion in *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977), where a warrantless seizure of an automobile by internal revenue agents to satisfy a tax levy was upheld. (FN8) Other cases seem to adopt the reasoning that once you have probable cause to seize a vehicle, or believe it is used for drugs, then exigent circumstances continue to exist even if the seizure is not made until several months later. *U.S. v. One Mercedes Benz, Four-Door Sedan,* 711 F.2d 1297 (5th Cir.1983); *U.S. v. Kemp,* 690 F.2d 397 (4th Cir.1982).

These cases validating a warrantless search absent exigent circumstances are unpersuasive. The argument concerning no reasonable expectation of privacy concerning your vehicle on a public street fails to recognize the factual situation in *G.M. Leasing Corp., supra.* That case involved a seizure of an automobile in order to satisfy a tax debt to the United States, a situation which is similar to a private repossession of an automobile to satisfy a debt. The language in this opinion concerning expectation of privacy on a public street must be

read in context of the facts of the case. A person who is in default on a debt or who is subject to a judgment lien does not have a reasonable expectation that his property will not be repossessed on a public street. On the other hand, a person has a reasonable expectation that if the government is seizing his property other than for purposes of satisfying a debt, a warrant will be secured. It is difficult to respond to the argument concerning the theory that if you once believed that the car contained drugs, you may forever seize the car based on exigent circumstances. This theory fails to recognize that both probable cause and exigent circumstances become stale and will no longer support the legality of a later seizure. *Cf. Montgomery v. State,* 584 So.2d 65 (Fla. 1st DCA 1991).

The argument relied on by the majority for upholding the search, that property may be seized based on probable cause much like a person, while having some initial facial appeal, is still equally unpersuasive. Neither the Supreme Court of the United States nor the Florida Supreme Court has accepted this position. General application of this concept would serve to totally emasculate the warrant requirements for the seizure of an automobile announced in *Coolidge, supra.* In addition, the position taken by the majority does not deviate from the argument that somehow the forfeiture statute authorizes warrantless seizures of property absent exigent circumstances, the very argument which is rejected in *In re: Warrant to Seize One 1988 Chevrolet Monte Carlo,* 861 F.2d 307, 311 (1st Cir.1988), and *O'Reilly v. United States,* 486 F.2d 208, 214 (8th Cir.1973).

I, therefore, see no reason to depart from the rule announced by the Supreme Court in *Coolidge, supra,* and alluded to by our supreme court in *Department of Law Enforcement,* that an automobile is not subject to warrantless seizure absent exigent circumstances.

FN1. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

FN2. The charges on which White was arrested are not the subject of the instant appeal.

FN3. Here, the police had probable cause to believe White's vehicle had been used to facilitate the sale of cocaine, as indicated by the following trial testimony:

> THE COURT: Do you know what basis existed at the time you made the arrest and searched the car to file a forfeiture proceeding, what information did you have that that vehicle had been used in illegal activity?
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> OFFICER SQUIRE: These were all Doug Pierce's cases, it's my understanding this vehicle had been used to deliver and sell cocaine on at least two occasions, maybe three.
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> PROSECUTOR: And you had been present at at least one of those sales?
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> OFFICER SQUIRE: Yes.
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> THE COURT: A sale from the car?
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> OFFICER SQUIRE: Yes.

FN4. White has not challenged the forfeiture on due process grounds and we do not address due process issues here. *See, Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 676-80, 94 S.Ct. 2080, 2088-90, 40 L.Ed.2d 452 (1974)(due process does not require federal law enforcement officers to obtain a warrant prior to seizing property they have probable cause to believe is subject to forfeiture); *U.S. v. Valdes,* 876

F.2d 1554, 1560 at fn. 12 (11th Cir.1989)(due process is satisfied under forfeiture statute "if the government is required to have a sound basis for believing that property is forfeit, and the owner has a fair opportunity to regain it."); *Smith v. Hindery,* 454 So.2d 663 (Fla. 1st DCA 1984)(Forfeiture Act does not violate due process).

FN5. In each of *Dixon, Lasanta* and *Linn,* the court, while holding that the warrant requirement applied to seizures for the purpose of forfeiture, still found another method of admitting the evidence. In *Dixon,* the court held the search and seizure to be illegal, but concluded that a pound of cocaine, found days after the car was seized and discovered only when the cellular phone was being removed, was in plain view and admissible under that exception to the warrant requirement. 1 F.3d at 1084. In *Lasanta,* after concluding that the search and seizure was illegal, the court found it to be harmless error and affirmed the conviction. 978 F.2d at 1306. In *Linn,* the court found the warrantless seizure of a motor vehicle was reasonable because the mobility of the vehicle, in effect, created "exigent circumstances." 880 F.2d at 215 ("... the 'mobility' underpinning of the automobile exception is, of course, closely related to our 'exigent circumstances' analysis, and is the compelling factor.").

FN6. *See also O'Reilly v. United States,* 486 F.2d 208, 214 (8th Cir.), *cert. denied,* 414 U.S. 1043, 94 S.Ct. 546, 38 L.Ed.2d 334 (1973); *In re: Warrant to Seize One 1988 Chevrolet Monte Carlo,* 861 F.2d 307, 311 (1st Cir.1988) (notes the continuing validity of *United States v. Pappas,* 613 F.2d 324, 330 (1st Cir.1979), where court held that the federal forfeiture statute would only be constitutional if construed to allow seizure "only when seizure immediately follows the occurrence that gives the federal agents probable cause ... and the exigencies of the surrounding circumstances make the

requirement of obtaining process unreasonable or unnecessary").

FN7. In *United States v. Bagley,* 772 F.2d 482 (9th Cir.1985), the court appears to abandon *McCormick* and *Spetz* relying on *California v. Carney,* 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). Both *Bagley* and *Carney,* however, involve cases where the police had reasonable grounds to believe that either contraband or evidence would be found in the vehicle at the time of the seizure or search. Such a reasonable belief did not exist in this case.

FN8. In *U.S. v. Decker,* 19 F.3d 287 (6th Cir.1994), relied on by the majority, the vehicles were properly seized pursuant to a warrant, and the focus concerned the propriety of the inventory after the vehicle was searched. I do not quarrel with the legitimacy of the inventory search but unlike *Decker,* in the instant case, the legality of the seizure is at issue.